IN THE CIRCUIT COURT OF GREENBRIER COUNTY, WEST VIRGINIA

STATE OF WEST VIRGINIA,

Plaintiff,

vs. Criminal Action No. 96-F-102(J)

MARY BETH DAVIS,

Defendant.

STATE'S RESPONSE TO DEFENDANT'S MOTION IN LIMINE

Comes now the State of West Virginia, by Counsel, W. Mark Burnette, Prosecuting Attorney of Greenbrier County, and in response to Defendant's Motion in Limine, states as follows:

I.

Defendant's Motion in Limine raises several issues wherein she contends that the State should be precluded from presenting testimony concerning those issues. Specifically, those issues are:

1. Any oral history obtained by Dr. Hooper "from a grandmother and further object to any oral testimony of any investigation that exceeds the autopsy report";

2. Dr. Hooper should be precluded from speculating as to the chemical content of Tegan Davis' stomach matter; and

3. The introduction of certain tissue sample findings as to the spread of caffeine in the body of Tegan Davis in that the tissues have been

> destroyed and Defendant is unable to have independent testing performed on the tissue.

Defendant objects to the State's introduction of any hearsay statements made by Dr. Hooper, a forensic pathologist, concerning the autopsy she performed on Tegan Davis. Specifically, Defendant objects to the introduction of any testimony statements Hooper learned from Tegan Davis' grandmother concerning Tegan's medical history. The State is aware of its responsibilities and limitations concerning hearsay testimony. Rule 803(4) of the West Virginia Rules of Evidence provides, in pertinent part:

> Statements for purposes of medical diagnosis or treatment. – Statements made for purposes of medical diagnosis or treatment in describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

Pursuant to the hearsay exceptions listed in Rule 803, the State responds that any such statements obtained by Dr. Hooper from the grandmother concerning Tegan's medical history are not hearsay statements and are therefore admissible.

Defendant next contends that Dr. Hooper should be precluded from testifying about any investigation she performed that exceeded the autopsy report. Defendant fails to specifically state what "investigation" Dr. Hooper conducted. Therefore, the State responds that it will abide by the West Virginia Rules of Evidence as to any and all testimony it presents.

Defendant contends that Dr. Hooper should be precluded from "speculating as to any chemical content" found within Tegan Davis' stomach and it further contends there is no evidence of any chemical analysis of the content of Tegan Davis' stomach. In response, Dr. Ronald C. Backer, toxicologist for the State of West Virginia, performed a report on April 26, 1982 concerning the content of Tegan Davis' stomach and that report clearly falls within the exceptions listed in West Virginia Rules of Evidence, Rule 803(4) and (8), thus, such testimony is clearly admissible. Furthermore, Dr. Backer will appear at trial to testify about the findings outlined in his report.

Finally, Defendant contends the State should be precluded from presenting testimony concerning testing on Tegan's tissue samples because the samples are no longer available and the Defendant is precluded from conducting independent tests. Clearly, the State has the duty to disclose material exculpatory evidence to the Defendant. However, when the issue is preservation of potentially exculpatory evidence, Defendant must show bad faith on the part of the government to prevail on the violation of due process claim. *Holden v. Legursky* 16 F. 3d 57 (4th Cir.) (1983). See also: *Arizona v. Youngblood* 48 U.S. 51 (1988). In the instant case, Defendant does not argue that the tissue samples were exculpatory, rather, Defendant simply wants the opportunity to have independent tests conducted. In that this case dates back to 1982, the samples are no longer available. In fact, Defendant does not raise the issue of bad faith concerning the destruction of evidence. Therefore, the State should be permitted to present the evidence concerning Tegan Davis' tissue samples. The issue, when there is no bad faith leading to the destruction of evidence, is one of weight of the evidence rather than

admissibility. Certainly, the Defendant may cross-examine the clinician who performed the tests. Moreover, Defendant can argue to the jury that due to the destruction of the evidence, and Defendant's inability to have further tests conducted, little weight, if any, should be given to the toxicologist test results.

WHEREFORE, based on the above, Defendant's Motion in Limine should be denied.

/s/ [Illegible]
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CERTIFICATE OF SERVICE

I, W. Mark Burnette, Greenbrier County Prosecuting Attorney, hereby certify that the "State's Response to Defendant's Motion in Limine" has been served upon Defendant by hand delivering a true copy thereof to counsel for Defendant, at the following address:

Paul S. Detch, Esquire
201 South Court Street
Lewisburg, West Virginia 24901.

Dated: /s/ [Illegible]

/s/ [Illegible]
W. Mark Burnette